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No. 94-990

In The

SUPREME COURT OF THE UNITED STATES
October Term, 1994

THE LIVING WILL CENTER, a limited liability company, and MERRILL G. HASTINGS, JR.,

Petitioners,

v.

NBC SUBSIDIARY (KCNC-TV), INC. and SUZANNE McCARROLL,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Colorado

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

In a televised news report on a controversial public issue, can the quotation of a medical ethicist's comments conveying his views about a product's worth be actionable -- consistent with the First Amendment -- when the broadcast fully described the facts supporting the ethicist's opinion and presented the plaintiff's own contrary views?

RULE 29.1 LISTING

During the course of this action, the name of respondent NBC Subsidiary (KCNC-TV), Inc. was changed to NBC Stations Management, Inc. NBC Stations Management, Inc. is a wholly-owned subsidiary of National Broadcasting Company, Inc. The parent company of National Broadcasting Company, Inc. is National Broadcasting Company Holding, Inc., which is not a publicly held company. The parent company of National Broadcasting Company Holding, Inc. is General Electric Company, a New York corporation with its principal office in Fairfield, Connecticut.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondents, NBC Subsidiary (KCNC-TV), Inc. and Suzanne McCarroll, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Supreme Court of Colorado's opinion in this case. The Colorado Supreme Court correctly applied governing law, including earlier Colorado cases and this Court's decision in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990), to conclude that an opinion based on fully disclosed underlying facts did not contain a provably false factual connotation, was figurative and hyperbolic in nature, and therefore was constitutionally protected. Contrary to petitioners' assertion, no conflict exists between or among the decision of the Colorado Supreme Court here and the decisions of this Court (including Milkovich), federal appellate courts, and other state supreme courts. Moreover, even if this Court were inclined to revisit Milkovich, this case affords no opportunity to explore any remaining uncertainty about constitutional protection for

"opinion" because it turns on an analysis of the particular facts involved and of Colorado law.

STATEMENT OF THE CASE

This lawsuit for libel and related claims under Colorado law arises from two television news reports about "The Living Will Center." The Living Will Center, a Colorado company run by publishing entrepreneur Merrill G. Hastings, Jr., sells "living will" forms and related documents for $29.95. In April 1991, Denver television station KCNC broadcast a story by reporter Suzanne McCarroll regarding The Living Will Center's sale of living will packets. In the introduction to the report, the KCNC anchorman noted that living wills had become popular and that hospitals and libraries in the Denver metropolitan area offered free living will forms. (Colorado provides by statute for a living will and offers a suggested form. See Colo. Rev. Stat. § 15-18-104 (1994).) He then referred to The Living Will Center's sale of living will packets for $29.95 and asked, "Is it worth it?"

McCarroll began her report by saying, "[S]ome in the business of medical ethics say that this is really exploiting people's fear of death. But the president of the company says it's an altruistic service providing forms for people to make difficult decisions. He says $29.95 is a nominal fee." In the report, McCarroll interviewed Living Will Center President Merrill Hastings as well as Dr. Frank Marsh, a medical ethicist and professor at the University of Colorado School of Medicine. Hastings described the documents provided by The Living Will Center, explained their function when used together, and defended the price charged. Marsh strongly disagreed.

Marsh commented, "I think it's a scam." McCarroll stated that Marsh had "reviewed these forms [in The Living Will Center's packet] and is disgusted. He says the medical directive and power of attorney forms are unnecessary -- certainly not worth paying for." Marsh then was quoted as

saying, "And they will send in $29.95 and what they get back is they've been taken -- is what it amounts to -- totally taken!" McCarroll went on to quote Marsh and others "in the medical ethics community" as saying that a living will form was all that was necessary. McCarroll also listed other sources in Denver and elsewhere from which viewers could get a living will form free or for a nominal five-dollar charge. The next day, KCNC aired a follow-up report in which it noted that one Denver hospital no longer provided a particular form and listed additional sources for free forms. (Transcripts of both broadcasts appear in the appendix to the Colorado Court of Appeals' decision, 857 P.2d 514, 521-24. See also Petition for Writ of Certiorari, Appendix ("Pet. App.") at 53-a - 61-a.)

The Living Will Center sued for libel and other state claims. Attached to its forty-five page verified complaint were twenty-five exhibits, including transcripts and a videotape of the broadcasts, copies of the items in the center's "living will" packet, and copies of the forms that KCNC had reported to be available elsewhere. Respondents moved to dismiss the case, arguing that Marsh's statements were not actionable because they were rhetorical hyperbole based on disclosed facts, and that the balance of the news reports either was not defamatory as a matter of law or was demonstrated by The Living Will Center's extensive exhibits to its own complaint to be substantially true. The District Court of Jefferson County, Colorado converted respondents' motion to dismiss to a motion for summary judgment and granted it. Petitioners appealed.[1]

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[1]The Living Will Center originally was the sole plaintiff. Petitioners were permitted to add Merrill Hastings as a plaintiff while the case was in the Colorado Court of Appeals.

The Colorado Court of Appeals reversed two-to-one. The two-judge majority concluded that the broadcasts implied assertions of material fact susceptible of being proved false and "[t]herefore, the complaint should not have been dismissed on the basis of lack of provable falsity." (Pet. App. at 48-a.) The court of appeals did not address whether any such "implie[d] material assertions" (id. at 47-a) were defamatory. The dissenting judge stated that she would have affirmed the dismissal because the words "scam" and "taken," in the context of the broadcasts as a whole, were hyperbolic statements of Marsh's opinion, based on disclosed facts, including the availability elsewhere of free living will forms. (Pet. App. at 50-a - 52-a.)

The Supreme Court of Colorado granted certiorari and reversed. In an opinion by Chief Justice Luis D. Rovira, the court remanded the case to the court of appeals with directions to reinstate the trial court's entry of summary judgment in respondents' favor. The court summarized the broadcasts at issue and then described its task as follows: "[W]e must first identify the appropriate standard for evaluating when defamatory statements are constitutionally protected under the First Amendment to the United States Constitution and article II, section 10 of the Colorado Constitution and thus are not actionable." (Pet. App. at 8-a.) The court discussed the leading Colorado Supreme Court case on the "fact vs. opinion" distinction in libel law prior to this Court's decision in Milkovich: Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351 (1983). Justice Rovira noted that the Burns court had "adopted a contextual test" and that, even before Milkovich, "not all statements of opinion [had been] constitutionally privileged" under Burns. (Pet. App. at 9-a.) The court discussed Milkovich and then concluded that "the factors identified by the Burns court for distinguishing between facts and opinions remain applicable under the Milkovich test." (Id. at 10-a.)

The Colorado Supreme Court listed the relevant factors that a Colorado court should consider in determining whether a statement contains a provably false factual connotation: "the phrasing of the statement, the context in which it appears, the medium through which it is disseminated, the circumstances surrounding its publication, and a determination of whether the statement implies the existence of undisclosed facts which support it." (Id. at 12-a.) The court then applied the standard it had articulated in Burns and here to the KCNC broadcasts. It concluded:

> [W]e are convinced that the terms "scam" and "taken" as well as the substance and gist of the broadcasts neither contain [n]or imply a verifiable fact nor can they reasonably be understood as an assertion of actual fact about LWC's product. Therefore, we hold that the broadcasts are constitutionally privileged.

(Id. at 13-a.)

Citing to the "language of apparency" Marsh used in stating his personal views, the court also observed that Marsh's statements constituted his "subjective evaluation of the packet's worth" and that the broadcast fully disclosed the basis for Marsh's forcefully expressed opinions: that several of the forms The Living Will Center was selling -- including the only truly necessary document, a living will form -- were available at little or no cost elsewhere in the community. (Id. at 13-a - 14-a.)

The Colorado Supreme Court also considered the "substance and gist" of the two broadcasts in their entirety. The court concluded that the broadcasts' implication -- that The Living Will Center's packet was not worth paying for because Denver area hospitals and libraries gave away the key form -- was "not a verifiable fact." (Id. at 21-a.) The court noted that, "The worth of a given service or product is an inherently subjective measure which turns on myriad

considerations and necessarily subjective economic, aesthetic, and personal judgments." (Id.)

Finally, the court addressed petitioners' claims that the broadcasts contained factual inaccuracies, such as which particular forms were available at which locations. The court concluded that any such minor errors did not defame The Living Will Center, and the court declined to second-guess KCNC's editorial judgments about which small details to include or omit from its broadcasts. (Id. at 23-a.)

Three justices dissented on procedural grounds. None of the dissenters disagreed with the majority's articulation of the governing Colorado standard for analyzing "opinion" speech. To the contrary, they expressly "agree[d] with the majority's exposition of the law concerning the actionability of a claim for defamation." (Id. at 25-a.) The dissenters quarreled only with the district court's conversion of respondents' motion to dismiss to a summary judgment motion before discovery had been taken, which they asserted to be "contrary to [Colorado's] rules of civil procedure." (Id. at 28-a.)

The Colorado Supreme Court denied rehearing and issued its mandate on September 14, 1994. The court subsequently recalled the mandate, in response to a motion filed by petitioners, and stayed its reissuance for thirty days. On November 15, 1994, the Colorado Supreme Court denied petitioners' motion to extend the stay of the mandate's reissuance.

REASONS WHY THE PETITION SHOULD BE DENIED

A. The Colorado Supreme Court Properly Applied Federal And Colorado Law Governing Rhetorical And Hyperbolic Opinions Voiced On The Basis Of Disclosed Facts.

Petitioners attempt to elevate an unremarkable and fact-intensive analysis that involved, among other authorities, this Court's decision in Milkovich, to an issue worthy of certiorari. They cannot do so. In its Living Will Center decision, the Colorado Supreme Court examined pre-Milkovich Colorado law, concluded that it is fully consistent with Milkovich, and then correctly applied those legal standards to the specific facts of this case.

Milkovich involved a sports columnist's accusation that a local high school wrestling coach had lied under oath in a judicial proceeding. This Court held that, while there is no separate, across-the-board "opinion" privilege, the United States Constitution does provide absolute protection for certain types of opinion under the long-established law of defamation. The Court reaffirmed that "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." 479 U.S. at 20 (citing Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986)). The Court also reaffirmed its recognition of "constitutional limits on the type of speech which may be the subject of defamation actions." 497 U.S. at 16 (emphasis in original). Citing with approval its Bresler-Letter Carriers-Falwell line of cases,[2] the Court reiterated

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[2]Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970) (the word "blackmail" was "no more than rhetorical hyperbole, a vigorous epithet" and therefore was not actionable); Letter Carriers v. Austin, 418 U.S. 264 (1974) (words "scab" and "traitor" were not

that the Constitution protects "imaginative expression," "rhetorical hyperbole," and other "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." 497 U.S. at 17.

In the proceedings below, respondents argued that Dr. Marsh's comments were constitutionally protected speech under Milkovich as well as under pre-Milkovich Colorado cases, including the Colorado Supreme Court's decision in Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351 (1983). In Burns, the Colorado court had emphasized the importance of "[t]he surrounding circumstances and factual context" in determining whether a given statement is actionable as defamation. 659 P.2d at 1359. The Burns court also applied the distinction proposed by the Restatement of Torts between "[a]n opinion based on undisclosed facts" and "an opinion which is based on circumstances set forth by the publisher and which support the proffered opinion." Id. (quoting Restatement (Second) of Torts § 566 comment b (1976)).

Here, the Colorado Supreme Court first considered whether Burns was in accord with Milkovich. (Pet. App. at 8-1 - 13-a.) Concluding that it was, the court held that Burns remains the governing law in Colorado for the analysis of "opinion" speech. (Id. at 11-a - 12-a.) The court then applied that governing law to the facts here, including the context and the circumstances surrounding the broadcasts, and correctly concluded that Dr. Marsh's "scam" and "taken" remarks as well as the gist of the

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defamatory because they were used "in a loose, figurative sense"); Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (parody, though crude and offensive, was not actionable).

broadcasts as a whole did not contain a provably false factual connotation regarding The Living Will Center.[3]

In reaching that conclusion, the Colorado Supreme Court carefully considered the context of the statements at issue. The lead-in to the report, ending with the question, "Is it worth it?", signaled to the viewers that the broadcast would present competing views on the controversial public issue of commerce in living wills. The KCNC broadcast included The Living Will Center's claim that it was providing a valuable service for a "nominal fee" as well as Dr. Marsh's contrary, critical view. Marsh was introduced as a "medical ethicist"; viewers thus expected moral and subjective, rather than legal and objective, observations from him. KCNC also told viewers the circumstances that supported Marsh's proffered opinion: that living will forms were available free and that those forms were "really all you need." In sum, the broadcast provided a statement of the facts underlying Marsh's slang terms. Thus, "scam" and "taken," in context, plainly represented Marsh's own value judgment about the worth of The Living Will Center's product.

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[3]Because the Colorado Supreme Court determined that the KCNC broadcasts were protected under article II, section 10 of the Colorado Constitution (Pet. App. at 8-a), an independent and adequate state ground supports the judgment below. Amicus curiae, the Colorado Broadcasters Association, expressly urged the Colorado Supreme Court to base its decision on the Colorado Constitution. See Brief of Amicus Curiae Colorado Broadcasters Association at 11-14. Respondents also noted in their brief on the merits below that article II, section 10 of the Colorado Constitution provided an independent basis for protecting Marsh's statements. See Opening Brief of Defendants/Petitioners NBC Subsidiary (KCNC-TV), Inc. and Suzanne McCarroll at 13 n.11. This independent non-federal ground is sufficient to sustain the judgment in respondents' favor and renders unnecessary any review by this Court of any federal issue raised below.

Petitioners' assertion that the Colorado Supreme Court failed to analyze "the social context of the statements, i.e., whether a viewer would expect rhetorical hyperbole in the context of a daily 'hard news' broadcast" (Petition at 8) turns the issue of context on its head. First, as detailed above, the court did consider the context of the statements, social and otherwise. (See Pet. App. at 13-a - 17-a.) In an effort to make this case into more than a fact-bound dispute, petitioners advance the implausible argument that a statement made in "a daily 'hard news' broadcast" -- as opposed to one made in a book or theater review, for example -- can never be constitutionally protected as rhetorical hyperbole under the Bresler-Letter Carriers-Falwell line of cases expressly reaffirmed in Milkovich. But those decisions of this Court say no such thing.

In fact, the Milkovich Court rejected just the kind of analysis-by-classification approach that petitioners propose. That a statement is made in an editorial, a critical review, or the like does not mean that it is automatically constitutionally protected[4]; conversely, that a statement is made in an afternoon local news broadcast does not mean that it is automatically actionable.[5] News reports on issues

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[4]Milkovich itself involved a sports page commentary rather than a front page "hard news" report. 497 U.S. at 4-5. See also Moldea v. New York Times Co., 22 F.3d 310, 313 (D.C. Cir.) (book review; "A writer may not commit libel at will merely by labelling his work 'a review'"), cert. denied, 115 S.Ct. 202 (1994).

[5]Courts have routinely found colorful and hyperbolic expressions to be constitutionally protected even though they were made in a news context. See, e.g., Chapin v. Knight-Ridder Inc., 993 F.2d 1087 (4th Cir. 1993) (Philadelphia Inquirer news report used term "hefty mark-up"); Brown v. Hearst Corp., 862 F. Supp. 622, 629 (D. Mass. 1994) (television station newsmagazine quoted police chief's statements suggesting that plaintiff killed his wife); Metcalf v. KFOR-TV, 828 F. Supp. 1515 (W.D. Okla. 1992) (local news series quoted doctor's views on physician plaintiff's practice, including statement

of public interest and concern[6] frequently present opposing views. If constitutional protection for those reported statements, made in connection with a controversial subject, disappeared merely because the statements appeared on the news, our print and broadcast press would be reduced to reporting on bake-offs and scout troop outings rather than national, state, and local political and social issues. The rule petitioners urge would eliminate the "imaginative expression" and "rhetorical hyperbole" that, as this Court has noted, have been a vital part of the "public debate . . . which has traditionally added much to the discourse of our Nation." Milkovich, 497 U.S. at 20 (quoting Hustler

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about "shams perpetrated on the public by greedy doctors"); Hickey v. Capital Cities/ABC, Inc., 792 F. Supp. 1195 (D. Or. 1992) (ABC News' "20/20" used terms "low," "repulsive," and "rotten" in referring to "black market in stolen pets" in which plaintiff was engaged), aff'd mem., 999 F.2d 543 (9th Cir. 1993); Lyons v. Globe Newspaper Co., 415 Mass. 258, 612 N.E.2d 1158 (1993) (Boston Globe article). Cf. Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724 (1st Cir.) (Boston Globe articles that accused plaintiff of "blatantly misleading the public" and quoted theater critic's description of plaintiff's play as "a rip-off, a fraud, a scandal, a snake-oil job" were, in context, "not reasonably interpreted as stating 'actual facts' about [plaintiff's] honesty"), cert. denied, 112 S. Ct. 2942 (1992).

[6]Petitioners have conceded from the outset that the subject of the KCNC reports – the "right to die" and, in petitioners' parlance, "advance medical directives" (Petition at 3) – is a matter of public interest and concern. The district court also so found as a matter of law. See Judgment of Dismissal, Pet. App. at 69-a - 70-a ("Issues of living wills and related documents and an individual's ability to make decisions and give instructions about his or her future medical treatment and care, particularly in light of life-sustaining medical technology, are matters of public interest and concern[,] and the two telecasts complained of fall within the area of public interest and concern").

Magazine v. Falwell, 485 U.S. 46 (1988)). See also id. ("debate on public issues [must] remain 'uninhibited, robust, and wide-open'" (quoting New York Times Co. v. Sullivan, 376 U.S. 254 (1964)).

Finally, petitioners contend that the Colorado Supreme Court erred in concluding that the gist of the broadcasts as a whole did not state or imply verifiable defamatory facts about The Living Will Center. (Petition at 15-17.) Petitioners are wrong again. The Colorado Supreme Court noted "the juxtaposition of the disclosed facts that living will forms were available at little or no cost from local hospitals and libraries, that many medical ethicists were of the opinion that this form was all that was needed to implement a valid living will, and that LWC charged $29.95 for its product." (Pet. App. at 21-a.) The court then concluded that, given these facts, whether it was "worth it" to pay nearly thirty dollars for The Living Will Center's packet was an "inherently subjective" question "for viewers to answer for themselves." (Id. at 21-a, 17-a.) The court also noted that the answer to that question here might well vary from one viewer to another, depending -- for example -- on whether a viewer had more time than money. (Id. at 22-a.) The court did not, as petitioners contend, hold that "every statement regarding a product's worth is subjective and therefore not actionable." (Petition at 16.) The court merely determined that, under the circumstances of this case -- including the free availability of the only essential form -- the gist of the broadcasts was not objectively verifiable. Once again, this was a factual, not a legal, issue.[7]

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[7]The case petitioners cite -- United States Medical Corp. v. M.D. Buyline, Inc., 753 F. Supp. 676 (S.D. Ohio 1990) -- is readily distinguishable. There, a medical equipment industry newsletter stated that the defendant "consistently gouges customers on price and service." Id. at 677. The Ohio district court questioned whether the

In sum, petitioners' claims that the Colorado Supreme Court failed to consider context and misapplied Milkovich are just wrong. The court analyzed the context of the objected-to remarks for pages on end, and correctly applied Burns, which it found to be fully consistent with Milkovich. Petitioners' real quarrel is with the outcome of the court's analysis. But petitioners' dislike of the result does not render this case worthy of certiorari.

B. The Claimed Conflict Among The Colorado Supreme Court's *Living Will Center* Decision And The Decisions Of Federal Appellate And Other State Supreme Courts Does Not Exist.

There is no conflict between or among the Colorado Supreme Court's Living Will Center decision and the other federal and state decisions petitioners cite. (See Petition at 13-15.) Petitioners discuss at some length the opinions of the United States Court of Appeals for the District of Columbia Circuit in Moldea v. New York Times Co., 15 F.3d 1137 (D.C. Cir.) ("Moldea I"), modified, 22 F.3d 310 (D.C. Cir.) ("Moldea II"), cert. denied, 115 S. Ct. 202 (1994). But Living Will Center is entirely in accordance with Moldea II.

In Moldea II the District of Columbia Circuit affirmed the entry of summary judgment for The New York Times in a libel suit over a book review. The court -- like virtually every court to consider this issue -- recognized the

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newsletter was even a media defendant, but concluded that in any event the statements at issue did not address a matter of public concern. Id. at 680. Moreover, in M.D. Buyline the defendant simply asserted that the plaintiff overcharged customers; here, by contrast, KCNC presented Marsh's remarks -- as well as Merrill Hastings' opposing views -- in the context of a debate about commerce in living wills, a subject of public interest.

importance of context. The court also looked to the Bresler-Letter Carriers "hyperbole" cases, as did the Colorado Supreme Court here. Then, applying governing law to the particular circumstances there, the Moldea court concluded that the Times' reviewer's statements were not verifiably false. As noted above, the fact that a statement in a book review may, depending on the context, be constitutionally privileged does not mean that a statement in a news broadcast cannot be. Here, the Colorado Supreme Court cited Moldea II as consistent not only with Milkovich but also with its own earlier Burns opinion (Pet. App. at 11-a) and, applying the Burns factors -- including context, phrasing, and the surrounding circumstances -- correctly concluded that Marsh's loose, figurative, evaluative remarks were not actionable.

Petitioners' claim that Living Will Center is "directly in conflict" (Petition at 14) with the Illinois Supreme Court's decision in Kolegas v. Heftel Broadcasting Corp., 154 Ill.2d 1, 607 N.E.2d 201 (1992), is also wrong. Kolegas is readily distinguishable. Anthony Kolegas, a promoter of classic cartoon festivals, bought radio advertisements for a festival to benefit sufferers of Elephant Man disease. After one of the radio spots aired, Kolegas called the station and talked with the disc jockey on the air. When Kolegas said that the festival was to be a benefit for sufferers of Elephant Man disease, the disc jockey responded, "You're gone" and hung up. The disc jockey and his partner then stated on the air that Kolegas "was 'not for real,'" that he "was just 'scamming' them," and that "there was 'no such show as the classic cartoon festival'". 154 Ill. 2d at 7, 607 N.E.2d at 205.

The defendant's statement in Kolegas that "there was 'no such show as the classic cartoon festival'" is plainly one of verifiable fact, and the statements that Kolegas "was 'not for real'" and "was just 'scamming' them" must be read in that context. The disc jockeys' statements undoubtedly

"contain a provably false factual connotation" (Milkovich, 497 U.S. at 20): that no such festival existed. Here, by contrast, KCNC presented contrary views on the inherently subjective question of whether it was "worth it" to pay nearly thirty dollars for forms when the operative form was available free. Whether something is "worth" the asking price to any particular person is not objectively verifiable, as the Colorado Supreme Court correctly concluded; whether a cartoon festival really is taking place is. Both Living Will Center and Kolegas correctly applied Milkovich and both were correctly decided.

The other case that petitioners, in a footnote, contend conflicts with Living Will Center is the Arkansas Supreme Court's decision in Waymire v. DeHaven, 313 Ark. 687, 858 S.W.2d 69 (1993). (Petition at 15 n.17.) But Waymire did not even address the issue of constitutional protection for the statements involved there, which included allegations that the plaintiff was "an absolute con" and "an absolute crook," and "was trying to scam [the defendant] for $15,000.00" in connection with a real estate deal. 858 S.W.2d at 70. The Arkansas Supreme Court decided only that the defendant's statements could constitute defamation per se under Arkansas common law. The defendant did not argue -- and the court did not consider -- any constitutional protection for the statements at issue.

In sum, what petitioners characterize as a "conflict" is no more than a group of cases in which courts properly have undertaken a fact-intensive review of the entire context in which objectionable statements were made. Not surprisingly, as the facts and contexts have differed, so have the outcomes. Federal and state courts -- including the Moldea II panel -- have focused squarely on verifiability in analyzing "opinion" speech, and have properly considered context as one relevant factor. The Colorado Supreme Court's Living Will Center decision is fully consistent with this uniform body of law.

C. In Any Event, This Case Is Not An Appropriate Vehicle For This Court To Reconsider Or Clarify *Milkovich*.

Finally, even if this Court were inclined to take petitioners up on their invitation to "clarify" Milkovich (Petition at 7), this case is not the case in which to do so. First, the case turns on an analysis of the particular facts involved, including a comparison between the living will and related forms that petitioners were selling and those that local hospitals and libraries gave away. Second, the court decided the case by reaffirming and applying the leading Colorado case, Burns v. McGraw-Hill Broadcasting, which, in turn, relied on an earlier Colorado case, Bucher v. Roberts, 198 Colo. 1, 595 P.2d 239 (1979), and on the "opinion" analysis of the Restatement of Torts. The Colorado Supreme Court considered the Restatement distinction, adopted in Colorado's common law, between opinions based on undisclosed facts and those supported by disclosed facts, and correctly found Dr. Marsh's remarks not to be actionable. In other words, Living Will Center would have been decided the same way before Milkovich as it was after it. This case, therefore, will not produce an opinion that will guide the lower courts. The national impact of letting the Colorado Supreme Court's decision stand is zero. Living Will Center does not qualify for review by this Court.

CONCLUSION

For these reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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